FILE COPY

Office - Supreme Court, U.S.
FILED
JUN 2 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 945

JOHN G. DUPUIS, JR.,

Petitioner,

vs.

CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT,

Respondent.

Petition For A Writ of Certiorari To The Supreme Court of Florida

---

RESPONDENT'S BRIEF AND APPENDIX IN OPPOSITION

CHARLES H. GAUTIER
Attorney for Respondent
Dade Federal Building
Miami 32, Florida

INDEX

	Page
OPINION AND ORDERS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
APPLICABLE PROVISIONS OF FLORIDA CONSTITUTION AND FLORIDA APPELLATE RULES	3
REASONS FOR DISMISSING OR DENYING THE WRIT	4
CONCLUSION	9
CERTIFICATE OF SERVICE	9

TABLE OF CITATIONS

CASES:	Page
Albury v. Central & Southern Florida Flood Control District, (Fla. App. 1958), 99 So.2d 248	8
Bowman v. Loperena, 311 U.S. 262	6
Conner v. Elliott, 79 Fla. 513, 85 So. 164, *cert. dismissed*, 254 U.S. 665	8
Dupuis v. Central & Southern Florida Flood Control District, Fla., 127 So.2d 679	1
Dupuis v. Central & Southern Florida Flood Control District, (Fla. App. 1960), 123 So.2d 34	1, 7
Dupuis v. Central & Southern Florida Flood Control District, (Fla. App. 1959), 109 So.2d 596	8
Dupuis v. Central & Southern Florida Flood Control District, (Fla. App. 1958), 105 So.2d 36	8
Herb v. Pitcairn, 324 U.S. 117	8
Herndon v. State of Georgia, 295 U.S. 441	8
Maule Industries v. Sheffield Steel Products, (Fla. App. 1958), 105 So.2d 798	8
Mich.-Wis. Pipe Line Co. v. Calvert, 347 U.S. 157	6
Southern Bell Telephone & Telegraph Co. v. Bell, Fla., 116 So.2d 617	6

CONSTITUTION, STATUTES AND RULES

	Page
Florida Constitution	
Article V, Section 4 (2)	3, 6
United States Code	
Title 28, Section 1257 (3)	2, 7
Title 28, Section 2101 (c)	5
Florida Appellate Rules	
Rule 4.5 (c) (6)	2
Rule 3.14	3, 5

TEXTBOOKS AND OTHER AUTHORITIES

Jurisdiction Of The Supreme Court Of The United States, Robertsen & Kirkham (1951 Ed.) Section 43, pp. 75-76	5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 945

JOHN G. DUPUIS, JR.,

Petitioner,

vs.

CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT,

Respondent.

Petition For A Writ of Certiorari To The Supreme Court of Florida

RESPONDENT'S BRIEF AND APPENDIX IN OPPOSITION

OPINION AND ORDERS BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported at 123 So.2d 34. The order of the Supreme Court of Florida denying certiorari is reported at 127 So.2d 679 and was entered January 31, 1961 (R. 253). On February 13, petitioner filed an "Ex-

traordinary Petition for Rehearing of Petition for a Writ of Certiorari" (See Certificate of Clerk, App. 1-2, infra). The Clerk of the Supreme Court of Florida returned this document to counsel for petitioner with an accompanying letter dated February 14, 1961, stating:

> "Dear Mr. Kirk:
>
> I am returning your 'Extraordinary Petition for Rehearing of Petition for a Writ of Certiorari' in the above cause as the rules of Court do not provide for filing such a paper." (App. 1-2, infra).

On February 21, 1961, petitioner filed a motion for waiver of Rule 4.5 (c) (6), Florida Appellate Rules, in the Supreme Court of Florida (R. 254-256; App. 1-2, infra). This motion was denied by the Supreme Court of Florida on March 6, 1961 (R. 257; App. 1-2, infra).

JURISDICTION

Petitioner attempts to invoke this Court's jurisdiction under 28 U.S.C., Sec. 1257 (3).

QUESTION PRESENTED

Petitioner attempts to raise questions concerning the interpretation of a 1910 deed reservation and, apparently, claims that the interpretation below has deprived him of his rights under "Constitutional Amendment V".

APPLICABLE PROVISIONS OF FLORIDA CONSTITUTION AND FLORIDA APPELLATE RULES

Florida Constitution, Article V, Section 4 (2), provides in pertinent part:

> " . . . The Supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law."

Florida Appellate Rule 3.14 provides:

"RULE 3.14. REHEARINGS

a. **Time For.** Unless further time is allowed, rehearings must be applied for by petition in writing within 15 days after the filing of the decision or order of the Court.

b. **Contents of Petition.** The petition for rehearing shall not assume a new ground or position from that taken in the original argument or briefs upon which the cause was submitted, and must set forth concisely, and without argument, the alleged omissions, oversights, causes or grounds on which it is based.

c. **Service.** A copy of the petition shall be served upon the opposite party or counsel and proof of such service shall be transmitted to the Court with the petition. The petition for rehearing shall not be considered a part of the record in the cause, unless so ordered by the Court, or unless rehearing is granted. No oral argument will be allowed on the petition.

d. **Rule Violation.** In case of a substantial violation of any material provision of this rule, the petition will be stricken by the Court on its own motion and the contents will not be considered.

e. **Only One Petition Allowed.** The petitioner shall be entitled to file only one petition for rehearing with respect to the particular decision and no further petition or motion will be received or filed by the clerk or considered by the Court.

f. **Further Pleadings.** The opposing party may file and serve a reply to a petition for rehearing within 5 days after he is served with a copy of the petition. No other pleadings shall be allowed."

REASONS FOR DISMISSING OR DENYING THE WRIT

Respondent respectfully submits that the petition should be dismissed or denied because:

1. The petition is untimely filed.

2. The petition does not seek review of a final judgment and is directed to the wrong court.

3. No Federal question was timely raised in the Florida courts.

4. On the merits, petitioner has not been denied due process of law.

A. The Petition Is Untimely Filed.

The petition was filed on May 4, 1961, ninety three days after denial of certiorari on January 31, 1961, by the Supreme Court of Florida (R. 253). Petitioner's abortive attempts to file a petition for rehearing in the Supreme Court of Florida did not toll the time for taking certiorari. Consequently, the petition should be dismissed because untimely under 28 U.S.C., Sec. 2101 (c).

Neither the "Extraordinary Petition for Rehearing" which petitioner sent and the Clerk of the Supreme Court of Florida returned, nor the motion to waive the appellate rules operated to toll the time for certiorari. The "extraordinary" petition was returned because not provided for in the rules; and the subsequent motion to waive the appellate rules was not even filed until after the fifteen days for filing a petition for rehearing had expired Fla. App. Rule 3.14.

In Section 43 of Robertsen & Kirkham, **Jurisdiction Of The Supreme Court Of The United States**, (1951 Ed.), pp. 75-76, the authors state the law:

"But of course, the time is not extended by

> a petition which is stricken for violation of the Court's procedural rules or by a second petition for rehearing which the highest state court has denied leave to file."

In **Bowman v. Loperena**, 311 U.S. 262, 266, this Court stated the general rule as follows:

> "The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot opperate to extend the time for appeal."

B. **Certiorari Directed To Wrong Court And Wrong Judgment.**

Under Florida practice, review of a District Court of Appeal decision by the Supreme Court is discretionary. Article V, Section 4 (2), Florida Constitution provides that the Supreme Court, under certain circumstances, "may review by certiorari any decision of a district court of appeal ... ." In Florida, denial of certiorari is not a review on the merits. **Southern Bell Telephone & Telegraph Co. v. Bell**, Fla., 116 So.2d 617.

The present petition is erroneously directed to the Supreme Court of Florida. E.g., **Mich.-Wis. Pipe Line Co. v. Calvert**, 347 U.S. 157. Moreover, the petition seeks "to review the judgment of the Supreme Court of Florida entered in the above entitled cause on March 6, 1961, which said judgment foreclosed petitioner from any relief by virtue of that certain judgment of the Supreme Court

of Florida dated January 3, 1961." (Petition, p. 1). The March 6, 1961 judgment merely denied petitioner's motion to waive Rule 4.5(c)(6), Florida Appellate Rules (R. 257), and the judgment dated January 31, 1961 was a denial of the petition for a writ of certiorari, not an adjudication on the merits (R. 253). The only "final judgment" in this case within the meaning of 28 U.S.C., Sec. 1257 (3) is that of the District Court of Appeal of Florida, Third District, reported at 123 So.2d 34.

C. **No Federal Question Raised Below.**

Examination of the record shows that Petitioner never raised and the Florida courts never considered the due process question now sought to be raised. The only mention of the United States Constitution in the proceedings below is the following paragraph in petitioner's petition for rehearing in the District Court of Appeal:

> "The Court failed to consider, or overlooked the fact that the lower court made numerous findings of fact based on competent evidence in the record, and also made decisions on law based on the statutes and laws applicable, including the Constitutions of the United States and the State of Florida, which the Court did not treat in its opinion so as to reverse the findings of fact and conclusions of law." (R. 249-251).

The petition for rehearing was denied, without an opinion (R. 248).

Under the cases, the above passing reference, in a petition for rehearing was neither timely nor specific

enough to raise any question in this Court. E.g., **Herndon v. State of Georgia,** 295 U.S. 441. The decision below could have come as no surprise to petitioner in view of the prior cases cited in the District Court of Appeal's decision. E.g., **Albury v. Central & Southern Florida Flood Control District,** (Fla. App. 1958), 99 So.2d 248, and the two prior decisions in the instant case reported at 105 So.2d 36 and 109 So.2d 596.

D. **On the Merits, Petitioner Has Not Been Denied Due Process of Law.**

The 1910 deed containing the reservation in question was recorded on July 5, 1910 (Respondent's Exhibit "D"). The petitioner purchased his land, which was part of the land conveyed by the 1910 deed, on September 9, 1931, subject to and on notice of said reservation (Petitioner's Exhibit "1"). **Maule Industries v. Sheffield Steel Products,** (Fla. App. 1958), 105 So.2d 798.

The pivotal issue in the trial court and on appeal was the construction of a reservation contained in a deed conveying Florida real property (R. 8-9). The construction, interpretation and validity of the reservation rests upon Florida real property law. **Conner v. Elliott,** 79 Fla. 513, 85 So. 164, *cert. dismissed* 254 U.S. 665. The reservation was construed and held to be valid in **Albury v. Central & Southern Florida Flood Control District,** supra. It is well settled that this Court will not review judgments of state courts that rest on adequate and independent state grounds. **Herb v. Pitcairn,** 324 U.S. 117.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be dismissed or denied.

Dated this 1st day of June, A.D. 1961.

CHAS. H. GAUTIER

CHARLES H. GAUTIER
Attorney for Respondent
Dade Federal Building
Miami 32, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Brief and Appendix In Opposition to Petition For a Writ of Certiorari To The Supreme Court of Florida was mailed to B. E. Hendricks and John E. Kirk, Attorneys for Petitioner, 414 Seybold Building, Miami 32, Florida, this 1st day of June, 1961, by depositing same in a United States Post Office with first class postage prepaid.

CHAS. H. GAUTIER

Attorney for Respondent

APPENDIX A

Certificate of Guyte P. McCord, Clerk of Supreme Court of Florida:

IN THE SUPREME COURT OF FLORIDA

JOHN G. DUPUIS, JR.,

Petitioner,

vs.

CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT,

Respondent.

CERTIFICATE OF CLERK

I, GUYTE P. MC CORD, Clerk of the Supreme Court of Florida do hereby certify:

THAT on January 31, 1961, an order was filed herein denying the Petition for Writ of Certiorari.

THAT on February 13, 1961, an "Extraordinary Petition for Rehearing of Petition for a Writ of Certiorari" arrived in the mail.

THAT on February 14, 1961, the "Extraordinary Petition For Rehearing of Petition for a Writ of Certiorari" was returned with the following letter:

"February 14, 1961

"Honorable John E. Kirk
Attorney at Law
414 Seybold Building
Miami 32, Florida

"Re: John G. Dupuis, Jr. vs. Central and Southern Florida Food Control District

"Dear Mr. Kirk:

"I am returning your "Extraordinary Petition for Rehearing of Petition for a Writ of Certiorari" in the above cause as the rules of Court do not provide for filing such a paper.'

"Most cordially,

/s/ GUYTE P. McCORD
"Clerk Supreme Court.

"GPM:sg
"cc: Hon. Charles H. Gautier
Attorney at Law
Dade Federal Building
Miami 32, Florida'

THAT on February 21, 1961, a Motion for Waiver of Rule 4.5, Sub-Section C (6), Florida Appellate Rules was filed herein.

THAT on March 6, 1961, an order was filed herein denying the Motion for Waiver of Rule 4.5, Sub-Section C (6), Florida Appellate Rules.

THAT petitioner, John G. Dupuis, Jr., did not file a petition for rehearing other than said "Extraordinary Petition for Rehearing of Petition for Writ of Certiorari."

THAT no order was entered extending or granting petitioner, John G. Dupuis, Jr., additional time within which to file a petition for rehearing.

All according to the files and records of this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the Supreme Court of Florida on this 22 day of May, 1961.

/s/ Guyte P. McCord
GUYTE P. McCORD
Clerk, Supreme Court

(Seal, Supreme Court
of Florida)